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CASE NO. 95-1268

IN THE SUPREME COURT OF THE ~~UNITED STATES~~
October Term 1995

STATE OF MARYLAND,
Petitioner,
vs.
JERRY LEE WILSON
Respondent.

ON WRIT OF CERTIORARI TO THE MARYLAND COURT OF SPECIAL APPEALS

BRIEF OF AMICI CURIAE STATES OF OHIO, ALABAMA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, ILLINOIS, IOWA, KANSAS, LOUISIANA, MICHIGAN, MINNESOTA, MISSISSIPPI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW MEXICO, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OKLAHOMA, OREGON, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, VERMONT, WASHINGTON, WEST VIRGINIA, WISCONSIN, THE COMMONWEALTHS OF KENTUCKY, MASSACHUSETTS AND PENNSYLVANIA, AND THE VIRGIN ISLANDS IN SUPPORT OF PETITIONER

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STATEMENT OF AMICUS INTEREST

Amicus State of Ohio and 38 other *amici* States write this brief to urge the Court to reverse the decision of the Maryland Court of Special Appeals and to highlight the importance of this issue to the States. In *Pennsylvania v. Mimms*, 434 U.S. 106 (1977), the Court held that police officers may automatically order the driver of a vehicle to exit the car during a legitimate traffic stop. The question presented here is whether the officer's authority to require the driver to exit the car extends to the vehicle's passengers.

In the decision below, the Maryland Court of Special Appeals held that the Fourth Amendment does not permit automatic exit orders in this setting, concluding instead that the officer must establish "heightened caution" before requiring passengers to exit the car. In doing so, the court ignored the underlying Fourth Amendment teachings of this Court in *Mimms* and subsequent cases, devalued the State's interest in protecting law enforcement officers, and overstated the liberty interests of passengers in a properly-stopped vehicle.

Like Maryland, the *Amici* States are entrusted with enforcement of highway safety violations. In meeting that responsibility, the *Amici* States are broadly concerned with judicial decisions that make the already-perilous job of law enforcement still more perilous, particularly with respect to the often dangerous context of traffic stops. Accordingly, the *Amici* States join together in asking the Court to reverse the lower court's decision.

SUMMARY OF ARGUMENT

The decision of the Maryland Court of Special Appeals contains three independent flaws. First, in assessing the Fourth Amendment reasonableness of the law enforcement officer's conduct in this instance, the court failed to respect the empirically-established dangers that police officers face from passengers of properly-stopped vehicles and overvalued the extent of the liberty intrusion that exit orders impose on such passengers. Second, the court overlooked the underlying Fourth Amendment teachings of *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) and its progeny and introduced an unworkable and highly impractical standard for police officers to observe in handling the risky setting of a vehicle stop. Third, the court created a Hobson's choice for officers, which in the end may well compromise their ability to reap the benefits of the settled *Mimms* rule. For example, under the decision below, officers are put to the dilemma of either ordering the driver to exit the vehicle under *Mimms* (which prevents officers from keeping an eye on the passengers) or allowing the driver and passengers to stay in the car (which prevents officers from realizing the benefits of *Mimms*). No plausible reading of the Fourth Amendment requires such a result.

ARGUMENT

FOR ESSENTIALLY THE SAME PUBLIC-SAFETY REASONS THAT POLICE OFFICERS MAY ORDER DRIVERS OF LAWFULLY STOPPED CARS TO EXIT THE VEHICLE UNDER *PENNSYLVANIA v. MIMMS*, 434 U.S. 106 (1977), THEY ALSO MAY ORDER PASSENGERS OF SUCH VEHICLES TO MAKE AUTOMATIC EXITS AS WELL.

"The touchstone" of any "analysis under the Fourth Amendment is always 'the reasonableness in all the circumstances'" of the law enforcement officer's conduct. *Pennsylvania v. Mimms*, 434 U.S. 106, 108 (1977) (quoting *Terry v. Ohio*, 392 U.S. 1, 19 (1968)). "Reasonableness," moreover, "depends 'on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers.'" *Id.* (quoting *United States v. Brignoni - Ponce*, 422 U.S. 873, 878 (1975)). *See also Whren v. United States*, ___ U.S. ___, 116 S. Ct. 1769 (1996).

In balancing this "public interest" against the "individual's right to personal security," the Court in *Pennsylvania v. Mimms* held that a police officer may automatically order the driver of a vehicle to exit the car during a legitimate traffic stop. In doing so, the Court made two critical observations. On the one hand:

> Establishing a face-to-face confrontation diminishes the possibility, otherwise substantial, that the driver can make unobserved movements; this, in turn, reduces

> the likelihood that the officer will be the victim of an assault.
>
> We think it too plain for argument that the State's proffered justification--the safety of the officer--is both legitimate and weighty.

434 U.S. at 110. On the other hand, the intrusion on the driver's liberty in these circumstances "hardly rises to the level of a 'petty indignity.'" *Id* at 111. The Fourth Amendment balance struck in *Mimms* thus turned on the significant dangers to law enforcement officers presented by such encounters and the *de minimis* liberty intrusion occasioned by exit orders. Applied here, that same test requires extension of the *Mimms* automatic-exit rule to the passengers of a properly-stopped vehicle.

A. The State's Recognized Interest In Protecting Law Enforcement Officers From Potentially Dangerous Vehicle Occupants Increases As The Number Of Vehicle Occupants Increases.

As a general matter, the peril to law enforcement officers responsible for making routine traffic stops is significant and well-documented. As this Court has repeatedly recognized, traffic stops result in a high percentage of officer fatalities. *See e.g., Adams v. Williams*, 407 U.S. 143, 148 n.3 (1972) (approximately 30 per cent of police shootings occur when a police officer approaches an automobile); *accord, Mimms*, 434 U.S. at 110; Bristow, *Police Officer Shootings--A Tactical Evaluation*, 54 J.Crim.L.C. & P.S. 93 (1963).

> That this prophylactic authority [to remove vehicle occupants] is essential is attested by the number of police officers wounded or killed in the process of making inquiry in borderline, seemingly minor violation situations -- for example, where the initial stop is made for a traffic offense but, unknown to the officer at the time, the vehicle occupants are armed and engaged in or embarked on serious criminal conduct.

Foley v. Connelie, 435 U.S. 291, 298 (1978). Not surprisingly, then, "a significant percentage of murders of police officers occurs when the officers are making traffic stops." *United States v. Robinson*, 414 U.S. 218, 234 n.5 (1973).

Regrettably, in the two decades since *Mimms* was decided, the number of assaults upon police officers has continued to grow. FBI statistics show that between 1990 and 1994, the number of police officers murdered in the line of duty increased by 15%. Federal Bureau of Investigation, *Uniform Crime Reports: Law Enforcement Officers Killed and Assaulted* (1994), 3 (hereinafter "FBI Report"). During 1994 alone, moreover, 76 law enforcement officers were killed in the line of duty. FBI Report, 3. Of those 76 officers, 11 were killed while enforcing traffic laws. FBI Report, 3.

More generally, between 1985-1994, 708 officers were killed -- 97 of them during traffic stops. FBI Report, 29. Sixty-five of these traffic-stop murders occurred while the officer was alone, FBI Report, 32, and 73 of the officers were killed by handguns, which may be easily concealed within a vehicle or on a person, FBI Report, 34.

Nor does the level of experience of police officers by itself account for these grim statistics. Of the 708 officers killed in the line of duty between 1985-1994, 173 were between the ages of 25-30, 256 were between the ages of 31-40, and 222 were over 40 years old. Likewise, during the same time span, 187 officers killed in the line of duty had from 1-4 years of service, 197 from 5-10 years of service, 281 over 10 years of service. (The FBI Report does not set forth the age or level of experience of the 97 officers who were killed during this time period while engaged in traffic stops.)

The number of assaults in this setting is no less striking.[1] In 1994, 64,912 line-of-duty assaults were reported resulting in 23,194 personal injuries. FBI Report, 73. Roughly 14 out of every 100 law enforcement officers were assaulted during this time, with 9% of the assaults occurring during traffic stops or pursuits. FBI Report, 67. Of the 5,762 traffic stop assaults, moreover, roughly one-third occurred while the officer was alone, and most of the injuries resulted from easily concealed weapons. *Id.* at 71-73.

To Ohio's knowledge, there are no statistics detailing the number of assaults or murders arising from passengers as opposed to drivers during traffic stops. However, several sources confirm what common sense suggests -- that unidentified passengers of a stopped vehicle are no less likely to pose a danger to law enforcement officers than

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[1] Ohio State Highway Patrol records indicate that in 1995 alone, the Patrol experienced 51 officer assaults and 308 incidents of resisting arrest. With few exceptions, each of these cases evolved from traffic-related encounters. The Ohio Highway Patrol is just one of many police jurisdictions in Ohio with power to enforce the traffic laws.

unidentified drivers. For example, several reported cases concern instances in which passengers, either in concert with a driver or singly, initiated confrontations with a police officer during a vehicle stop. *See, e.g., Hester v. State*, 544 S.W.2d 129 (Tex. Crim. App. 1976) (driver and passenger opened fire on police officer during a routine traffic stop, killing two officers); *Jones v. Texas*, 480 S.W.2d 623 (Tex. Crim. App. 1972) (passenger jumped from car as police officer approached, grabbed and attempted to strangle police officer, and stuck a .22 pistol in his stomach); *Kansas v. White*, 508 P.2d 842 (Kan. 1973) (passenger produced gun and shot at three officers).

Newspaper articles are equally rife with references to passenger assaults on police officers. *See, e.g.*, Wesley Loy, *Police Seek Man Who Shot Officer; Bulletproof Vest Saves Cop From Serious Injury*, Orlando Sentinel Tribune, March 20, 1990 (passenger fired 4 shots at officer); Richard Saltus, *Man Allegedly Pulls Gun On Trooper Before Help Arrives For An Arrest*, Boston Globe, March 27, 1994 (passenger threatened officer with pistol during traffic stop); Chris Moeser, *Man Shot Twice By Mesa Officer At Traffic Stop*, Phoenix Gazette, October 26, 1994, at B1 (passenger pushed driver out of car and attempted to run officer down with car); Calvin Lear, *Lawyers File Motion To Delay Trial*, Capital City Press, Baton Rouge, La., Saturday State-Times/Morning Advocate, August 12, 1995, at 4B (passenger shot officer in the head as officer attempted to arrest driver during traffic stop). *See also* Veronica T. Jennings, *For Officers, Traffic Stops Are Full of Potential Danger; Best of Circumstances Can End In Tragedy*, Washington Post, April 16, 1990, at A1 ("The only routine traffic stop is the one you drive away from.") (quoting Prince George's County Cpl. Chuck Cooke).

At bottom, the Maryland Court of Special Appeals failed to appreciate the significance of statistics like these and failed to respect the stark dangers of stopping a vehicle containing multiple occupants as opposed to a vehicle containing merely a driver. In the lower court's view, the need to protect officers from a passenger was "just as great" as the need to protect them from a driver. The essential fact of the matter, however, is this: An officer who stops a crowded car faces far more peril than one who stops a car with only a driver.

B. Ordering Passengers To Exit A Lawfully-Stopped Vehicle Constitutes A *De Minimus* Intrusion On Their Personal Liberty.

Not only did the lower court improperly minimize the increased danger to the police officer of stopping a car with several occupants as opposed to just one, the Court also exaggerated the liberty interest of the passengers. Contrary to the lower court's conclusion, the passenger of a lawfully-stopped vehicle under these circumstances does not face a greater personal liberty intrusion than the driver. Both individuals have voluntarily chosen to use the State's highways. Both individuals are momentarily prohibited from continuing to their immediate destination. And both individuals face an equally *de minimus* liberty intrusion by being ordered to exit the vehicle. As with the driver, the passenger of a lawfully-stopped vehicle realistically is not going anywhere. The only real question is whether the passenger is going to spend the stop sitting in the car or standing alongside it. *Mimms*, 434 U.S. at 111. And, of course, even if passengers wish to leave the scene, they still have to exit the vehicle before doing so.

Moreover, the directive to passengers to leave the vehicle is no different from directives customarily given by police officers to citizens in other settings. A police officer thus may take "control of the scene" in the carrying out of his or her duties. *State v. Barger*, 874 S.W.2d 653 (Tenn. Crim. App. 1994). The "scene" encompasses where a crime, a traffic accident, a medical emergency, or a fire has occurred, and the policeman's purpose may be to "exclude bystanders and curious sightseers to facilitate the administration of aid to the victims and the gathering of evidence." *Barger*, 874 S.W. 2d at 653. Indeed, most States prohibit interference with the carrying out of a police officer's duties. *State v. Lashinsky*, 404 A.2d 1121, 1125-26 (N.J. 1979) ("In the performance of their duties they may give reasonable directions . . . [A]n individual toward whom such directions are directed has a correlative duty to obey them."). An officer making a traffic stop is also in charge of the scene, and an order to a passenger to depart a vehicle is precisely the kind of directive that reasonable citizens should anticipate following. Whatever the situation, in short, citizens reasonably anticipate and accept the right of police officers to issue such sensible (albeit liberty-infringing) directives under these circumstances.[2]

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[2] Acceptance of police officer directives has a long history. At common law, the sheriff had the authority to direct the populace to aid in the enforcement of the law. *See Compton-Waldrop v. City of Va. Beach Police Dept.*, 463 S.E. 2d 675, 677 (Va. Ct. App. 1995) ("As in the days of Edward I, the citizenry may be called upon to enforce the justice of the state, not faintly and with lagging steps but honestly and bravely and with whatever implements and facilities are convenient and at hand.") While the doctrine of "posse comitatus" may itself have diminished over time, the notion that police may direct citizens at the scene of a crime or investigation still exists.

For these reasons, the Court has aptly noted the reasonable expectations of motorists during a roadside detention:

> The vast majority of roadside detentions last only a few minutes. A motorist's expectations, when he sees a policeman's light flashing behind him, are that he will be obliged to spend a short period of time answering questions and waiting while the officer checks his license and registration, that he may then be given a citation, but that in the end he most likely will be allowed to continue on his way.

Berkemer v. McCarty, 468 U.S. 420, 437 (1984). Passengers in such vehicles have no right to expect anything more or less.

In the end, what was true in *Mimms* is just as true here: Not only is the insistence of police that passengers temporarily exit a lawfully-stopped car not a "serious intrusion upon the sanctity of the person," but it hardly rises to the level of a "petty indignity." 434 U.S. at 111 (citation omitted). It thus seems implausible that the same Fourth Amendment that allows an officer to compel drivers to exit a car under *Mimms* restricts the exercise of that right when there are more (rather than fewer) dangers to the officer.

Nor, in any event, will the lower court's "heightened caution" standard be workable in practice, be sufficient to protect the officer's safety or even be respectful of the officer's rights under *Mimms*. The new standard is not workable because there is no principled way to assure that it will have predictable meaning to officers, judges and citizens alike. The new standard does not protect officers because by

the time officers perceive additional danger signals from the passengers of a stopped vehicle (beyond those normally attendant to traffic stops), it may be too late for the officers to protect themselves. And, worst of all, the new standard does not even allow officers to reap the benefits of *Mimms*. Under the lower court's decision, officers face the dilemma of either removing the driver from the car under *Mimms* (thus making it more difficult to keep an eye on the passengers) or leaving the driver in the car (thus giving up the automatic-exit rights provided by *Mimms*). At all events, the lower court's decision injects additional uncertainty and danger into an already uncertain and dangerous situation, and mistakenly uses the Fourth Amendment as the basis for doing so. The decision should be reversed.

CONCLUSION

For the foregoing reasons, the decision of the Maryland Court of Special Appeals should be reversed.

Respectfully Submitted,

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